89-981

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MIRIAM GELBAND and LEO KAYSER, III,
Individually and as Shareholders of TEXACO INC.,
suing on behalf of themselves and in the right of
and for the benefit of TEXACO INC.,

Petitioners,

– against –

TEXACO INC., JOHN K. McKINLEY, WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L. MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H. ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Were the party-plaintiffs in a shareholders' derivative suit actively pending in New York denied Procedural Due Process by the New York trial court which dismissed their suit, on grounds of *res judicata* and Full Faith and Credit, based upon a Delaware consent judgment to which the New York plaintiffs were not parties, where:

(a) the New York plaintiffs had timely moved to intervene in the Delaware action but defendants opposed their motion to intervene and leave to intervene was denied;

(b) the defendants negotiated and executed the Delaware settlement agreement without notice to said New York party-plaintiffs;

(c) the defendants obtained, without notice to said New York party-plaintiffs and in violation of Delaware and federal law, a preliminary injunction from the Delaware Chancery Court enjoining said party-plaintiffs

from proceeding in New York pending approval of the settlement by way of entry of a consent judgment in Delaware;

(d) the defendants and settling plaintiffs in Delaware entered into a stipulated set of facts which assumed the ultimate factual conclusion of defendants' good faith motivations, to which the New York party-plaintiffs expressly excepted, but to which the New York party-plaintiffs were bound for purposes of the Delaware proceeding when their motion to intervene was denied;

(e) the New York plaintiffs were not permitted to opt -out of the Delaware derivative suit; and

(f) New York party-plaintiffs stated objections to the Delaware consent decree, but the standard of review accorded them was highly limited and did not afford them the procedural and substantive rights they would have if permitted to intervene as party-plaintiffs in the action.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MIRIAM GELBAND and LEO KAYSER, III, Individually and as Shareholders of TEXACO INC., suing on behalf of themselves and in the right of and for the benefit of TEXACO INC.,

Petitioners,

-against-

TEXACO INC., JOHN K. McKINLEY, WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L. MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H. ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INTRODUCTION

Petitioners MIRIAM GELBAND and LEO KAYSER, III, individually and as shareholders of TEXACO INC., on behalf of themselves and in the right of and for the benefit of TEXACO INC., respectfully pray that based upon the serious questions of procedural due process stated in the Questions Presented herein, this Court grant a writ of *certiorari* to review the judgment of the New York Supreme Court, as affirmed by New York Appellate Division and denied further review by the New York Court of Appeals, dismissing their pending New York shareholders' derivative action under the Full Faith and Credit Clause based upon a Delaware consent decree.

OPINIONS BELOW

The Order of the Court of Appeals of New York denying Petitioners' motion for reargument of Petitioners' motion for leave to appeal, without opinion,

has not been reported, but is reproduced in the Appendix (A-18).[1]

The Order of the Court of Appeals of New York denying Petitioner's motion for leave to appeal, without opinion, was reported at 74 N.Y. 2d 606, 543 N.Y.S. 2d 398, 541 N.E. 2d 427 (1989). (A-16)

The Order of the Court of Appeals of New York dismissing Petitioner's appeal to that court, without opinion, was reported at 72 N.Y. 2d 951, 533 N.Y.S. 2d 58, 529 N.E. 2d 426 (1988). (A-14)

The Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, affirming the trial court, without opinion, was reported at 140 A.D. 2d 1013, 529 N.Y.S. 2d 929 (1988). (A-12)

The opinion and order of the Supreme Court of the State of New York (Hon. Andrew R. Tyler, J.), was not

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[1]Numbers in parenthesis preceded by "A" refer to pages of the Appendix to this Petition.

reported. The opinion (A-1) and order (A-8) of the trial court are reproduced in the Appendix to this Petition.

JURISDICTION

The Order of the Court of Appeals of the State of New York denying Petitioner's timely motion for reargument of Petitioner's motion for leave to appeal was dated and entered September 14, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 1, of the Constitution of the United States

Fifth Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

STATEMENT OF THE CASE

On March 23, 1984, Petitioner Gelband initiated a derivative shareholders' suit against the directors of Texaco, Inc. through the service of a summons and complaint. (R. 16-22)[2] The Complaint[3] alleged a gross waste of corporate assets, a breach of fiduciary duty and a discriminatory repurchase of approximately 10% of the outstanding common stock of Texaco, Inc. from the Bass syndicate at a price of $50 per share on March 6, 1984, when the shares were trading at $42.625 per share that day. The complaint further alleges that said purchase was for the sole unlawful purpose of maintaining

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[2]Numbers in parenthesis preceded by "R" refer to pages of the Record on Appeal in the Appellate Division of the Supreme Court of the State of New York, which Record was also submitted to the Court of Appeals of New York.

[3]For purposes of this appeal, the allegations of the complaint are assumed to be true and the complaint is assumed to state good causes of action. The issue herein is whether the causes of action have been extinguished by a Delaware consent judgment to which Gelband was not a party.

management control. (R. 15-22)

On May 19, 1984, the Texaco directors moved to dismiss the complaint for an alleged failure to make a proper demand on the Board of Directors prior to initiating the suit. (R. 230-245) This motion was withdrawn and an answer was interposed by defendants dated June 19, 1984, in light of a decision[4] dated March 14, 1984 in Delaware which held that the Texaco directors had an interest in the transaction with respect to the issue of corporate control. (R. 246-258)

From June 20, 1984 to November 14, 1984, Gelband actively engaged in discovery, obtaining documents from the defendant directors and attending certain depositions[5] being conducted pursuant to an agreement for joint discovery for the several New York and

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[4]This decision arose out of a contested motion.

[5]Depositions attended were those of John K. McKinley, Chairman of the Board of Texaco, and John P. Hellstrom, an investment banker who provided advice to Texaco, two of the six depositions taken. (R. 46, 217)

Delaware actions. (R. 278-302)

On or about November 14, 1984, Gelband received notice for the first time[6] that various plaintiffs' counsel in the consolidated derivative shareholders' actions in Delaware had negotiated and executed a stipulation of settlement, which was presented to the Delaware Chancellor to be incorporated into a court order dated November 14, 1984. (R. 219, 45-48) The November 14, 1984 Delaware court order *inter alia*, expressly enjoined Gelband from proceeding in New York stating:

> Pending final determination of whether the Settlement should be approved, the Court of Chancery has ordered that no member of the class and no Texaco stockholder may commence or prosecute any action asserting claims which have been or could have been asserted arising from or relating to any of the matters or transactions referred to in the Subject Actions or in the Stipulation.
> (R. 48, 220-221)

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[6]No doubt Gelband was excluded from the negotiations because of the opinion of her counsel as communicated to counsel for the Texaco directors that the derivative shareholders' case was very strong. (R. 217-8, 305)

The Stipulation of Settlement also incorporated into the November 14, 1984 order the following pivotal factual conclusions:

> Texaco management reviewed these self-tender and stock repurchase proposals and concluded that they were not in the best interest of Texaco or its stockholders. Thus, Texaco management determined that a repurchase program of the magnitude Mr. Bass was suggesting, and the resultant shrinking of Texaco's capitalization, was inconsistent with the business plans of the company. Messrs. McKinley and DeCrane testified that, under the circumstances, they viewed the Bass Defendants' ownership of approximately 9.9 percent of Texaco stock and the possibility that the Bass Defendants might acquire substantial additional shares to be disruptive of Texaco and a threatened diversion of management's attention from its pursuit of important business plans, including the integration of its operations with the recently acquired Getty Oil Co. Moreover, Texaco management believed that such disruption was likely to continue to take place notwithstanding the assurances by Mr. Bass that the Bass Defendants were supportive of Texaco management, in part because of the perception of the business and financial community of the intentions of the Bass Defendants. (R. 46, 88-89).

Not only were the settlement negotiations conducted behind the back of Gelband, with the stipulation of

settlement having been executed with no notice to Gelband, but the Texaco directors obtained the preliminary injunction contained in the November 14, 1984 Order without any notice whatsoever to Gelband. (R. 218-221) Gelband was compelled by the November 14, 1984 Order, having been enjoined from seeking protection of the New York courts or proceeding in New York in any other manner, to appear in Delaware to oppose settlement. Gelband was not afforded any opportunity to "opt-out" of the Delaware action.

Gelband filed papers in the Delaware Chancery Court objecting to the settlement and moving to intervene so as to avoid the agreement between the settling plaintiffs and the Texaco defendants stipulating to the ultimate factual conclusion that the Texaco directors had acted in good faith.[7] (R. 222-226; 71-94)

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[7]The argument of the Texaco directors was that they were too engaged in the digestion of Texaco's recent acquisition of the Getty Oil Company to have to worry about a tender offer or proxy fight challenging that corporate policy. (R. 46) This Court may take judicial notice that subsequent to the entering of the consent

Gelband expressly objected to that factual conclusion.[8] (R. 88-90) Defendants opposed Gelband's motion to intervene. (R. 429) Gelband's objections were overruled (R. 133-134, 139-140, 145) and her motion to intervene was denied. (R. 133-134, 139-140, 145) The Chancery Court did "not sit as though it were trying the case on the merits," but was merely required "to exercise its own independent business judgment" as to the fairness of the settlement proposal. (R. 122-123) Under this highly limited standard of review, the consent judgment providing for dismissal of the derivative shareholders suit

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judgment on March 12, 1985 (R. 141-145), a Texas jury found that Texaco had wrongfully acquired Getty Oil by inducing a breach of contract, which determination was affirmed by both the Texas intermediate appellate court and the Texas Supreme Court. Texaco settled paying over $3 billion to Pennzoil with its petition for *certiorari* pending before this Court and after filing for protection under Chapter 11 of the United States Bankruptcy Code.

[8]The position of Gelband was that the underlying facts, which themselves were not in dispute, lend themselves to a very different factual conclusion. Gelband has never had an opportunity to present her position on the merits to any court. (R. 87-90)

with no recovery for Texaco and the award of $700,000 in legal fees plus disbursements to plaintiffs' counsels (despite any significant outcome of the actions) was entered on March 12, 1985. (R. 141-145) Gelband appealed to the Supreme Court of Delaware, but was handicapped by the further limited scope of review which permitted that Court to examine only whether or not the Chancellor had abused his discretion in exercising his business judgment as to the reasonableness of settlement by settling plaintiffs. (R. 199-220)[9] The Supreme Court of Delaware affirmed in an opinion dated March 10, 1986. (R. 190-207)

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[9]In a single paragraph of its decision (R. 203, ¶1), the Delaware Supreme Court stated that Delaware case law precludes plaintiffs' attack on "greenmail," and defendants have made much of that paragraph in arguing that plaintiffs have had their "day in court" in Delaware. Plaintiffs maintain that the paragraph is entirely dictum, inaccurate as a statement of Delaware law, *see, e.g., City Capital Associates v. Interco*, 551 A.2d 787 (Del. Ch. 1988), and no substitute for plaintiffs' rights to litigate their claims on the merits, either as intervenors in Delaware or in their already pending New York action.

HOW THE FEDERAL QUESTION WAS PRESENTED BEFORE THE COURTS BELOW

By notice of motion dated April 15, 1986, the Texaco defendants moved in New York Supreme Court to dismissed Gelband's complaint on the ground of *res judicata*. (R. 29-30) The moving papers explicitly raised the federal question under the Full Faith and Credit Clause, and argued that plaintiffs had been afforded due process in the related Delaware proceedings. Plaintiffs responded that the procedures by which the Delaware consent decree were obtained were insufficient, as a matter of federal constitutional law under the Due Process Clause, to give *res judicata* to the Delaware judgment. By decision dated August 14, 1986, the New York Supreme Court, Hon. Andrew Tyler, J., granted the Texaco directors' motion. The decision noted the constitutional arguments made by defendants under the Full Faith and Credit Clause, and by plaintiffs under the Due Process Clause, and held that it was required to dismiss the complaint under the Full Faith and Credit

Clause. Although noting that Gelband had been denied the right to intervene, the trial nevertheless equated the appearance of Gelband for purposes of objecting to the stipulation of settlement as sufficient to accord full faith and credit against Gelband in New York, holding that procedural due process should be presumed. (A-6)[10] The order settling the decision was entered October 3, 1986. The decision (A-1) and the Order (A-8) of the New York Supreme Court are printed in the Appendix hereto.

Plaintiffs appealed to the Supreme Court of New York, Appellate Division, First Department. The appeal

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[10]The sole authority relied upon by Justice Tyler for this presumption was 9 Carmody - Wait 2d §63:245, which related to non-representative actions where a sister state had jurisdiction over the party challenging the sister state's judgment. *Compare* 9 Carmody-Wait 2d §63:246. The lower court also erroneously cited to 2 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶905.03, and CPLR §908 relating to class actions (the case at bar is a derivative shareholders' action), which do not relate to actively pending parallel actions and the rights to litigants therein, but rather to passive members of a class.

directly addressed the federal question under the Due Process Clause. By order entered May 19, 1988, the Appellate Division affirmed the trial court, without opinion. (A-12)

By Notice of Appeal dated June 22, 1988, plaintiffs appealed to the New York Court of Appeals, based upon the constitutional questions arising under the Full Faith and Credit and Due Process Clauses of the state and federal constitutions. The Court of Appeals conducted a *sua sponte* review of its jurisdiction over the appeal, and dismissed the appeal on September 22, 1988, without opinion. (A-14)

By notice of motion dated February 15, 1989, plaintiffs sought leave to appeal to the New York Court of Appeals. While plaintiffs' arguments on this effort to be heard concentrated on the application of *res judicata* under New York law, the federal question under the Due Process Clause was stated in the Questions Presented and plaintiffs invited its consideration by the

Court. The Court denied leave to appeal, without opinion, by Order dated June 15, 1989. (A-16)

By notice of motion dated July 10, 1989, plaintiffs sought reargument of their motion for leave to appeal to the Court of Appeals, based primarily on the principles recently stated by this Court in *Martin v. Wilks*, 490 U.S. ---, 109 S.Ct. 2180, 104 L.Ed. 835 (1989). The Court of Appeals denied the motion for reargument, without opinion, by order dated September 14, 1989. (A-18)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THIS COURT TO DETERMINE WHETHER THE DUE PROCESS CLAUSE PERMITS NON-PARTIES TO BE BOUND BY A CONSENT DECREE ENTERED IN A CLASS ACTION OR REPRESENTATIVE SUIT IN WHICH THEY WERE NOT PERMITTED TO OPT-OUT AND WERE DENIED LEAVE TO INTERVENE

The dismissal by the trial court of this actively pending New York action -- based upon a Delaware consent decree to which petitioners herein were not parties and were denied leave to intervene as parties by the successful opposition of defendants, where plaintiffs had no opportunity to opt-out of the Delaware action, but were bound by its stipulated factual conclusions with which they disagreed -- presents a useful vehicle for finding the minimum standards of due process which must be met before Full Faith and Credit may be given to consent decrees in representative actions. An elucidation of standards in this area would be useful not merely to the litigants now before this Court, but to the parties and courts involved in numerous other derivative

and class action suits across the United States.

As this Court stated in *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 117,

> [W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

To the general principle "that one is not bound by a judgment in personam in a litigation in which he has not designated as a party or to which he has not been made a party by service of process," the Court noted a limited exception for "class" or "representative" suits. 311 U.S. at 40, 41. The Court itself observed that the extent of the exception for representative suits was "not precisely defined by judicial opinion." 311 U.S. at 41. On the particular facts in *Hansberry*, the Court found the judgment in the prior representative suit could not be accorded *res judicata* because this would deny due

process to non-parties not adequately represented in the first action. The Court declined to offer rules or guidelines as to the minimum requirements of due process before *res judicata* could attach to judgments in other representative suits.

As the Tenth Circuit observed in 1974, "[t]he touchstones of due process in class actions have always been notice and adequacy of representation, but their interrelationship has never been completely and clearly articulated." *In re Four Seasons Securities Law Litigation*, 502 F.2d 834. Academic criticism has made the same point. *See, e.g.*, Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. Law Rev. 589 (1974) ("important questions remain undecided regarding how to determine the proper extent of binding effect.")

> Whether absentee class members ... must be given notice and an opportunity to be heard in a class suit if that suit is to comport with due process is a question much debated.... To date, the debate has proved inconclusive.

Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318, 1402-03 (1976)

Case law has only filled in some areas. In *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this Court held that for notice to be constitutionally sufficient under the Due Process Clause, it must be "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." 339 U.S. at 314. Even where there was a guardian *ad litem* appointed by the Court, notice to absentee parties was held constitutionally required. *Id.* In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed.2d 732 (1974), the Court applied the notice requirements of *Mullane* specifically to class actions, under Fed. R. Civ. P. Rule 23 (c)(2).

Defendants have maintained that plaintiffs were adequately represented as objectors to the Delaware

consent decree. Yet the standard of review accorded non-party objectors denied plaintiffs any hearing on the merits of their claims. Plaintiffs' claims were not dismissed for failure to state a cause of action, nor was summary judgment granted based upon the lack of any substantial issue of law or fact. Rather, plaintiffs were held bound to a consent decree approved by the Delaware Chancellor merely because it appeared fair to him in his business judgment, and on appeal by the Delaware Supreme Court merely upon not finding that the Chancellor had abused his discretion in applying the independent business judgment standard for approval of the consent decree.[11] The opportunity to state objections under this highly limited standard of review

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[11]A leading academic comment on *res judicata* in derivative actions has described the hostility of settling parties and courts to objectors, and the "heavy burden ... placed on ... an objector to rebut the presumption that the offered settlement is a fair resolution." Note, *Res Judicata in the Derivative Action: Adequacy of Representation and the Inadequate Plaintiff*, 71 Mich. L. Rev. 1042, 1056 (1973).

is not equivalent to a determination on the merits.[12]

This Court has held that a shareholders' derivative suit is entitled to a determination on the merits of the corporation's claim, with the same right to trial by jury, under the Seventh Amendment to the U.S. Constitution, as the Corporation would have had if it had prosecuted the claim itself. *Ross v. Bernard*, 396 U.S. 531, 536, 90 S.Ct. 733, 736 (1970). Plaintiffs have taken every affirmative step possible to avoid being bound by a consent decree they opposed, and to prosecute their claims to a determination on their merits. This Court should now specifically examine whether defendants who opposed intervention by absent parties and thus blocked a determination of the merits of their claims may use the Full Faith and Credit Clause to dismiss an action already

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[12]Nor is it any substitute for the right to be represented in the *negotiation* of the settlement. *See, Breswick & Co. v. Briggs*, 139 F.Supp. 297 (S.D.N.Y 1955). Although they participated in joint discovery for the New York and Delaware actions, plaintiffs were not informed of settlement negotiations until after the agreement was signed and before the Court for approval.

pending in a sister state.

One academic commentator has noted that even "adequate representation" is only "the next best alternative to a day in court." "[E]ach absentee should be offered the opportunity to enter an appearance as to request exclusion." Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Rule 23*, 123 U. Pa. L. Rev. 1217, 1261 (1979) Another commentator notes a model of "private control" to ensure "adequate representation" would give each class member "a presumptive right to intervene or opt out." *Developments in the Law -- Class Actions*, 89 Harv. L. Rev. 1318, 1414 (1976).

A number of cases have focused on the availability of notice and of an opportunity to "opt-out" from a class action as a guarantee of due process to absentee class members. In *Antibiotic Antitrust Actions*, 333 F. Sup. 296, (S.D.N.Y. 1971) *aff'd.* F.2d 1119, *cert. denied* 408 U.S. 930, 92 S. Ct. 2496, 33 L. Ed.2d 343 (1972), plaintiffs

who sought to collaterally attack a class action had been given notice and an opportunity to "exclude themselves from the class," but neither opted out from the class action nor sought leave to intervene, and instead decided to participate merely as objectors. Their willing participation as mere objectors was held sufficient to bind them by the judgment. *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir. 1974) held that due process was satisfied where a party was given notice of the terms of a proposed class settlement, an explicit opportunity to opt-out, and a warning that they would be bound if they failed to opt-out. The issue reached this Court in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985) which considered whether a state court properly asserted personal jurisdiction over absent plaintiff class members sufficient so that under the Due Process Clause, *res judicata* would reasonably be expected to attach to the judgment. This Court specifically held:

[D]ue process requires at a minimum that an

> absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court.

472 U.S. at 812, 105 S. Ct. at 2974. This requirement was *in addition* to the requirement "that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* The Court held that notice of an opportunity to "opt-out" was sufficient where absent class members received the notice but failed to affirmatively opt out, that due process was thus satisfied, and the absentees would be bound by the judgment under principles of *res judicata*.

Gelband was given no opportunity to "opt-out" of the Delaware consent settlement, in contrast to the procedures mandated and approved by this Court in *Phillips*. Rather than passively risk preclusion, by the Delaware settlement to which they were denied any opportunity to opt-out, plaintiffs *affirmatively* sought to protect their derivative claims and avoid being bound by the consent decree by moving to intervene, and thus

obtain a right to litigate their claims on the merits in Delaware. Defendants opposed the application to intervene, and leave to intervene was denied by the Delaware Chancellor.

Plaintiffs thus took every affirmative step possible to avoid being bound by the consent decree they opposed. They did not simply ignore the Delaware proceeding, recognizing "that intervention is a far better course than subsequent collateral attack, if intervention is feasible." *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045 (3d Cir. 1980). Plaintiffs cannot be charged with "an unjustified or unreasonable failure to intervene [which] can serve to bar a later collateral attack." *Id.* Like the plaintiffs in *Society Hill*, plaintiffs herein are "not barred by *res judicata* because [they] were *denied* intervention and did not have an adjudication on the merits of the issues raised by the plaintiffs in this case." 632 F.2d at 1050, n. 4.

The factual record in this case, involving plaintiffs with an already pending, actively litigated lawsuit in New York, who were not even afforded an opportunity to affirmatively opt out of the derivative suit pending in Delaware, but who nonetheless actively and timely sought leave to intervene in Delaware and were successfully opposed by defendants, affords this Court an excellent opportunity to clarify the due process standards which must be met before Full Faith and Credit and *res judicata* may take effect. The highly limited standard of review accorded to plaintiffs' objections to the Delaware settlement did not satisfy plaintiffs' constitutional right to a determination of the merits of their shareholders' derivative claims, and indeed, to a trial by jury of legal claims. This Court should determine whether in the absence of determination on the merits or an opportunity to "opt out," and despite the successful opposition by respondents to petitioners' application to intervene in Delaware, due process permits New York

to dismiss a pending action based upon Full Faith and Credit and *res judicata*.

II. THE NEW YORK COURTS DISREGARDED PRINCIPLES RECENTLY ANNOUNCED BY THIS COURT REGARDING CIVIL RIGHTS CONSENT DECREES, AND THE COURT SHOULD EXAMINE WHETHER THOSE PRINCIPLES APPLY TO SHAREHOLDER LITIGATION

On June 12, 1989, this Court announced its decision in *Martin v. Wilks*, 490 U.S. ---, 109 S.Ct. 2180, 104 L. Ed.2d 835. The Court held that a group of white firefighters were allowed to attack collaterally, in a separate, subsequent action, a consent decree previously entered settling an action by the NAACP and black firefighters against the City of Birmingham, Alabama. The Court's holding came notwithstanding the facts that (1) the trial court which had approved the consent

decree in the previous action did so only after requiring publication of notices of public hearing,[13] (2) white firefighters, represented in part by the Birmingham Firefighters Association, appeared at the hearings and stated objections to the consent decree,[14] (3) the trial court carefully considered, and rejected, each of the objections in turn,[15] and (4) white firefighters moved to intervene in the class action only after the hearing, and their application was denied as untimely.[16]

A group of white firefighters subsequently challenged employment decisions made purportedly pursuant to the consent decrees. The trial court ruled that to the extent the employment decisions were mandated by the consent decrees, they could not be

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[13]109 S.Ct. at 2183, 2191.

[14]109 S.Ct. at 2183, 2191.

[15]109 S.Ct. at 2191-2192.

[16]109 S.Ct. at 2183, 2191-2192. *United States v. Jefferson County*, 28 FEP Cases 1834 (N.D. Ala. 1981).

challenged in the subsequent lawsuit. Despite "the strong public policy in favor of voluntary affirmative action plans," the Eleventh Circuit reversed, holding that the because the white firefighter plaintiffs "were neither parties nor privies to the consent decrees, ... their independent claims of unlawful discrimination are not precluded." *In re Birmingham Reverse Discrimination Litigation*, 833 F. 2d 1492, 1498 (1987).

The Court specifically rejected the argument that "because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an 'impermissible collateral attack.'" 109 S.Ct. at 2185. The Court held that full joinder as a party, rather than "knowledge of a lawsuit and an opportunity to intervene," is necessary to make a consent decree binding. The Court placed the burden on proponents of the consent decree rather than its opponents:

> It makes sense ... to place on [the parties to a lawsuit] a burden of bringing in additional parties where such a step is indicated, rather

> than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

109 S.Ct. at 2186.

The *Martin* decision is a dramatic departure, as the Court itself noted that most Circuit Courts of Appeals had rejected, as "impermissible collateral attacks," suits by persons who had prior knowledge of a consent decree but failed to timely move to intervene. 109 S.Ct. at 2185 n. 3. Indeed, *Martin* went considerably further than necessary to sustain the position of petitioners herein, as they had timely and affirmatively moved to intervene in the Delaware action. Rather than seeking affirmatively to join plaintiffs as parties in Delaware, respondents herein, as defendants in Delaware, successfully opposed plaintiffs' motion for leave to intervene! The dismissal by the New York Supreme Court, of plaintiffs' actively pending New York action on grounds of *res judicata* and Full Faith and Credit, should be reviewed in light of the *Martin* principles.

The present case is a compelling vehicle for determining the application of the *Martin* principles to shareholders' derivative actions. Unlike the white firefighters who were allowed in *Martin* to litigate a separate, subsequent action challenging the Birmingham consent decree, petitioners did not begin their New York action after the entry of the consent decree. Rather, plaintiffs' New York action was commenced the same month, March 1984, (R. 16-22) as that of those plaintiffs who entered into the consent decree in Delaware.

Unlike the white firefighters who were allowed to challenge the Birmingham consent decree, plaintiffs *did* timely move to intervene in the Delaware action. (R. 222-226; 71-94). Defendants opposed plaintiffs' application to intervene in the Delaware action, and leave to intervene was denied by the Delaware Chancellor. (R. 133-134, 139-140, 145). This Court held that even persons who were aware of a prior action which affected their rights and did not timely attempt to

intervene are entitled to pursue a subsequent collateral attack. Under these principles, petitioners herein, who did timely attempt to intervene in Delaware, should surely not barred by the Delaware consent decree from continuing their pending New York action.

Additional consideration should be given to petitioners' claim in that the Delaware consent decree with other shareholders does not carry the weight of historic importance and high national purpose which attached to the consent decree establishing an affirmative action plan to redress past discrimination. The Birmingham consent decree was entered only after the District Court had already found, after trial, that defendants violated Title VII of the Civil Rights Act of 1964 in using a biased screening test for job applicants. 109 S.Ct. at 2191. The underlying litigation "was brought to change a pattern of hiring and promotion practices that had discriminated against black citizens in Birmingham for decades." 109 S.Ct. at 2200. Plaintiff

white firefighters were nonetheless held entitled to attack the consent decree which had ended the litigation and adopted a remedial program of affirmative action. The consent decree entered in Delaware, in which no recovery was had for any of the plaintiff shareholders or the corporation, but $700,000 in fees were awarded to "plaintiffs'" counsel, has no historic importance and fulfills no compelling national purpose. It should accordingly be given less, rather than more, preclusive effect than the Birmingham consent decree.

The defense that the objections made by plaintiffs to the Delaware consent decree are sufficient to give it *res judicata* effect parallels to the unsuccessful arguments of those who would bind the white firefighters by the consent decree to which they were not parties. The dissenting Justices in *Martin* stressed the careful consideration given by the District Court to the objections stated by the white firefighters, represented in part by the Birmingham Firefighters Association, who

objected to the decree. The dissenters noted that the Court found that the litigation would probably be held liable eventually for discrimination, and that the remedies adopted in the consent decree were 'reasonably commensurate with the nature and extent of the indicated discrimination.' 109 S.Ct. at 2192 (quoting District Court). Under the highly limited standard of review accorded to plaintiffs' objections in Delaware, they should not be any more bound by having stated those objections, than were the white firefighters who stated objections to the Birmingham consent decree.

Moreover, in arguing that the Birmingham consent decree should bind the white firefighters who later opposed it, the dissenters made particular note of the observation of the trial court 'that there is no contention or suggestion that the settlements are fraudulent or collusive.' 109 S.Ct. at 4621 (quoting District Court).

> The implementation of a consent decree affecting the interests of a multitude of nonparties, and the reliance on that decree as a defense to a charge of discrimination in hiring and promotion decisions, raise a

> legitimate concern of collusion. No such allegation, however, has been raised. Moreover, there is compelling evidence that the decree was not collusive.

109 S.Ct. at 2196. In contrast, plaintiffs indeed alleged that the Delaware consent decree was collusive, and that the only beneficiaries were the attorneys for the settling plaintiffs who received $700,000 in legal fees under the settlement. (R. 112-113, 121-122, 134-137, 219)

This Court has shown special concern that shareholders' derivative suits not be too easily dismissed. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 86 S.Ct. 845 (1966). The Court should take this opportunity to determine whether the due process protections and relief from *res judicata* afforded to firefighters who did not timely seek intervention before settlement of a civil rights action remedying past discrimination should apply to plaintiff shareholders who *did* timely seek intervention before settlement of a derivative action brought by other shareholders.

CONCLUSION

For all of the reasons contained herein, a writ of *certiorari* should be issued to the Court of Appeals of the State of New York.

Dated: New York, New York
December 12, 1989

Respectfully submitted,

LAWRENCE C. MOSS
Counsel of Record
KAYSER & JAFFE
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10 East 40th Street, 43rd Floor
New York, New York 10016
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APPENDIX

SUPREME COURT : NEW YORK COUNTY DM 13
IAS : PART 9
----------X

MIRIAM GELBAND and LEO KAYSER, III,
Individually and as shareholders of
TEXACO INC., suing on behalf of
themselves and in the right of and
for the benefit of TEXACO INC.,

Plaintiffs, Index No.
12502/84

-against-

TEXACO INC., JOHN K. McKINLEY, WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L. MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H. ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Defendants.
----------X

ANDREW R. TYLER, J.:

This is a motion by defendants for dismissal of the complaint in this action, commenced by the plaintiffs Gelband and Kayser, shareholders of defendant Texaco, Inc. in their own behalf and on behalf of Texaco, against the president (McKinley) and the defendants directors of Texaco, pursuant to CPLR 3211 (a) 5 upon the ground that the action is barred by res judicata. In the alternative they seek summary judgment upon the same ground.

Plaintiffs are holders of common shares of defendant, Texaco, Inc. and commenced this derivative action pursuant to section 626 of the Business Corporation Law, against the president and present and past directors. In the complaint they allege that there has been a gross waste of corporate assets, a breach of fiduciary duty and that defendants carried out a discriminatory business transaction by repurchasing (approximately 10%) of the outstanding shares of Texaco, Inc. from a shareholder, Bass Bros. Entertainment, Inc. at a price far in excess of the market value. $50 per share was paid for the stock around March 6, 1984 and the shares closed at $42.625 that day and subsequently dropped to $40.00 per share. They are seeking to recover damages and an order rescinding the Texaco-Bass purchase transaction or, in the alternative, an order directing defendants to purchase plaintiffs' shares (and those of other shareholders) upon the same terms as those of Bass were purchased. They also seek an award of attorneys fees, costs and disbursements.

Texaco is a Delaware corporation. A number of actions, later consolidated were instituted in the Court of the Chancery of the State of Delaware. Plaintiffs herein were not named as parties there but the action Good, etal v Texaco, Inc., etal (consolidated action) was a class action and shareholder derivative action which defendants argue is similar if not identical to the within action since the Good action was also directed at the March 6, 1984 offer and later purchase of Bass stock, as grossly excessive, a gift of Texaco's assets, an illegal vote buying scheme and a breach of fiduciary duty, among other allegations. Also there was an allegation of illegal discriminatory dividends payable to some but not all the common shareholders of Texaco. An injunction of defendants was sought in the Good action, a recission of the Bass Transaction, a declaratory judgment that anti takeover amendments were illegal null, and void, and an

accounting by Texaco directors and Bass, and reasonable fees for attorneys, accountants, and experts.

Plaintiffs participated, although not entirely, in discovery in the Delaware action. Non Delaware actions were also pending. Parties entered into a stipulation of compromise and settlement, subject to the approval of the Delaware court. The stipulation provided among other things that the Texaco-Bass repurchase agreement would be modified to eliminate the alleged illegal vote-buying scheme in that the eight Bass defendants would be required to vote their preferred Texaco stock: "proportionally to the votes cast by the Texaco common stockholders" instead of in accordance with the recommendation of Texaco director defendants; dismissing the Delaware action as to defendants, and with prejudice as to plaintiffs; and permanently barring and enjoining plaintiffs, all members of the class, all Texaco stockholders "from instituting or prosecuting any other actions in any court in Delaware or any other jurisdiction based upon or for the purpose of enforcing any claim ... within the scope of the pleadings..." It provided for an award of legal fees of $700,000 and of disbursements to plaintiffs attorneys upon application to the Delaware court; that directors defendants would pay disbursements and 78.57% of legal fees while Bass defendants would pay 21.43% of legal fees; that Texaco would pay all costs of settlement and administration.

Plaintiffs Gelband and Kayser were not notified of settlement negotiations and state that merely Notice of Settlement and hearing was sent out to them dated November 14, 1984. They filed a memorandum of law in opposition to the settlement and their counsel appeared at the settlement hearing and argued against it.

The settlement was approved by the Delaware court on 2/19/85.- The movants herein assert: that plaintiffs' (Gelband and Kayser) claims were rejected that the

Texaco Board in repurchasing the Bass shares was motivated by their desire to protect their positions on the board but that the Board was attempting to avert a hostile takeover and direct its efforts to integrating recently acquired Getty Oil Co. into its operations. An order and judgment approving the settlement and dismissing the consolidated actions with prejudice against all plaintiffs was entered on March 12, 1985; that the order and judgment was affirmed on March 10, 1986 (upon appeal) by the Delaware Supreme Court.

Plaintiffs assert that the judgment pursuant to (consent) stipulation of settlement in the Delaware Court was never decided on the merits, leaving many legal and factual issues to be decided and that plaintiffs' motion to intervene in that action was denied; that plaintiffs were never notified of settlement negotiations or accorded procedural due process; that defendants are stopped by the Good decision from pursuing this motion to dismiss. Plaintiffs state that they engaged in discovery (in Delaware case); that plaintiffs were excluded from settlement negotiations and the first notice they received was mailed on 11/14/84. They state that they were enjoined by the Delaware court from proceeding on their motion for partial summary judgment in this Court (NY) and were forced to seek intervention in the Delaware action; that they were denied procedural due process in that they were given no notice of negotiations or execution of the stipulation of settlement. They assert that the hearing on the proposed settlement was not an evidentiary one, requiring witnesses and testimony.

Defendants argue that the Full Faith and Credit Clause of the US Const. (US Const. Art. IV, Sect. 1) prohibits this complaint upon a showing that the requirements of the Due Process Clause were met in the court of the sister state (Delaware); that plaintiffs Gelband and Kayser received notice of the proceedings; their interests were represented and they were afforded an

opportunity to be heard. Plaintiffs Gelband and Kayser on the other hand have asserted that they were denied due process in the Delaware consolidated action in various respects, including the refusal by the court to permit them to intervene, the failure to provide an evidentiary hearing, and the failure of defendants to notify these New York plaintiffs of settlement negotiations.

The following has been stated:

> "The general principle is that no person may be bound by an in personam judgment in litigation in which he has not been designated a party nor been served with process. However, the class action has long been recognized as an exception to this rule and, provided the requirements of due process have been met, the judgment in a class action may bind members of the class who were represented but not made parties to the suit...: (2 Weinstein-Korn-Miller NY Civ Prac., par. 905.03).

and

> "One of the most important requirements of due process is...that the class have been adequately represented.."

Further, CPLR 908 by requiring court approval prior to dismissal, discontinuance and compromise of class actions insures that individual rights of members of

the class are not impaired by the settlement, etc. unless they have been given sufficient opportunity to object.

Under the Full Faith and Credit Clause of the US Constitution (US Const., Art IV, Section 1), each state is required to give effect to the public acts, records, and judicial proceedings of every other state.

There is a presumption that the judgment of a sister state is valid and binding; that the court had jurisdiction over the parties, and acted in accordance with the applicable rules of practice and procedure, the burden being upon the one questioning the foreign judgment, to show otherwise (9 Carmody-Wait 2d section 63:245). As long as the court of the sister state had jurisdiction, its judgment cannot be impeached "by showing irregularities in the form of the proceeding, or by proof of noncompliance with some law of the state..." (9 Carmody-Wait 2d, supra).

Where a judgment of a court of another state is entitled to Full Faith and Credit, New York Courts are precluded from any inquiry into the merits of the cause of action, logic or consistency of the decision, validity of legal principles on which the judgment was based (Re Morgan Guaranty Trust Co., 28 NY2d 155 cert den 404US826).

The function of the Full Faith and Credit Clause is to avoid relitigation of issues in other states which have already been litigated.

Although the plaintiffs herein have asserted that their motion to intervene was denied, they were permitted to argue and object at the hearing on the settlement and to intervene to the extent that they appealed the judgment to the Supreme Court of Delaware in which it was affirmed.

The hearing on the proposed settlement was conducted on 12/20/84. The settlement had not provided a direct monetary award to the shareholders or Texaco. After Chancellor Brown rendered his opinion February 19, 1985 approving it as fair and reasonable, and denying objections (inclusive of Gelband and Kayser), the order and judgment was signed.

This court determines that the stockholder proceedings in the Delaware Courts are entitled to Full Faith and Credit and as such bar the instant action. The order and judgment of March 12, 1985 was subsequently affirmed by the Supreme Court of the State of Delaware on March 10, 1986. Texaco was incorporated pursuant to the laws of Delaware. There is no question of the Court's (Delaware) jurisdiction over the parties and the subject matter which was being litigated. The complaint herein alleges that plaintiff Kayser is a New York resident. Gelband and Kayser have not raised claims herein that are separate and distinct from those upon which the Delaware actions were based, all turning upon the propriety of the Texaco-Bass transaction of March 6, 1984. Chancellor Brown there found that the settlement was fair and reasonable while noting that the plaintiffs (Shareholders) there were not persuaded that they would ultimately prevail on the merits because of the "business judgment rule" defense asserted by the defendants.

Accordingly, the motion by defendants for dismissal is granted.

Settle order.

DATED: AUGUST 14, 1986.

/s/ A. R. T.

J. S. C.

At an Individual Assignment Part 9 of the Supreme court, held in and for the County of New York at the County Courthouse, 60 Centre Street, New York, New York, on the 15 day of September, 1986.

PRESENT: HON. ANDREW R. TYLER, Justice

- -x

MIRIAM GELBAND and LEO KAYSER, III Individually and as Shareholders of TEXACO INC., suing on behalf of themselves and in the right of and for the benefit of TEXACO INC.,

Plaintiffs,

Index No. 12502/84

-against-

ORDER

TEXACO INC., JOHN K. McKINLEY, WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L. MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H. ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Defendants.

- -x

The Defendants Texaco Inc., John K. McKinley, Willard C. Butcher, Frank T. Carey, Alfred C. DeCrane,

Jr., The Earl of Granard, James W. Kinnear, Elvis L. Mason, Thomas H. Moorer, Thomas S. Murphy, George Parker, Jr., Lorene L. Rogers, Robert V. Roosa, Frank H. Ulrich, Thomas A. Vanderslice, and William Wrigley, having duly moved, pursuant to CPLR 3211, for an order dismissing the complaint in this action with prejudice on the ground that the claims herein are barred under the doctrine of res judicata by a judgment entered in related litigation in the Delaware Court of Chancery on March 12, 1985, or, in the alternative, for and order pursuant to CPLR 3212 granting summary judgment in favor of the defendants on the same grounds;

Now, upon reading and filing:

(a) Plaintiffs' summons and complaint dated March 22, 1984 and notice of motion for dismissal or in the alternative for summary judgment dated April 15, 1986;

(b) the affidavit of Eric M. Roth in support of defendants' motions sworn to on April 15, 1986, and the exhibits thereto;

(c) the affidavit affirmed under penalties of perjury of H. Miles Jaffe in opposition to the defendants' motion dated May 1, 1986 and the exhibits thereto;

(d) the affidavit of Rodman Ward, Jr. in support of the defendants' motions sworn to on June 9, 1986 and the exhibit thereto; and

(e) all of the pleadings and prior proceedings heretofore had herein;

And after due deliberation being had thereon, The Honorable Andrew R. Tyler having rendered an Opinion dated August 14, 1986;

Now, upon the motion of Skadden, Arps, Slate, Meagher, & Flom, attorneys for the defendants, it is:

ORDERED, that the motion of the defendants to dismiss the complaint with prejudice is granted; and it is further

ORDERED, that the complaint in this action herein be, and the same hereby is, dismissed with prejudice pursuant to CPLR 3211 (a) (5); and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

/s/ A. R. T.

J. S. C.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 19, 1988

Present--Hon. Leonard H. Sandler Justice Presiding
John Carro
Bentley Kassal
Ernst H. Rosenberger
George Bundy Smith Justices

Miriam Gelband and Leo Kayser, III, Individually and as Shareholders of Texaco Inc., suing on behalf of themselves and in the right of and for the benefit of Texaco Inc.,

Plaintiffs-Appellants,

against

Texaco Inc., John K. McKinley, Willard C. Butcher, Frank T. Cary, Alfred C. DeCrane, Jr., The Earl of Granard, James W. Kinnear, Elvis L. Mason, Thomas H. Moorer, Thomas S. Murphy, George Parker, Jr., Lorene L. Rogers, Robert V. Roosa, Franz H. Ulrich, Thomas A. Vanderslice and William Wrigley, 29825

Defendants-Respondents.

An appeal having been taken to this Court by the plaintiffs-appellants

from an order of the Supreme Court, New York County

(Andrew Tyler, J.), entered on October 3, 1986,

and said appeal having been argued by Leo Kayser, III,

of counsel for the appellants, and by Barry H. Garfinkel,

of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order

so appealed from be and the same is hereby affirmed. Respondents shall recover of appellants $75 costs and disbursements of this appeal.

ENTER:

HAROLD J. REYNOLDS

Clerk

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals in the City of Albany on the twenty-second day of September A.D. 1988

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 1109 SSD 79

Miriam Gelband et al.
Appellants,

v.

Texaco Inc., et al.,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court

sua sponte, upon the ground that no substantial constitutional question is directly involved.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals in the City of Albany on the fifteenth day of June A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

1-10 Mo. No. 296
Miriam Gelband et al.
Appellants,
v.

Texaco Inc., et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals in the City of Albany on the fourteenth day of September A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 298
Miriam Gelband et al.
Appellants,

v.

Texaco Inc., et al.,
Respondents.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court